SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 661

LEO AWOTIN, PETITIONER,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO

ON WRIT OF CERTIORARI TO THE APPELLATE COURT, FIRST DISTRICT, STATE OF ILLINOIS

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

FEBRUARY TERM, A. D. 1934.

LEO AWOTIN, *Defendant in Error,* vs. ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, a corporation, *Plaintiff in Error.*	Error to Circuit Court, Cook County. Honorable A. W. SUMMERS, Judge Presiding.

TRANSCRIPT OF RECORD.

1 PLACITA.

3 Praecipe filed August 19, 1930.

4 Summons issued August 19, 1930.

7 Declaration filed September 5, 1930.

Declaration contains the common counts and the following special count:

"For That Whereas, Also, the defendant, ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, a corporation, on to-wit: November 1st, 1929, at Chicago, Illinois, offered to sell to this plaintiff Thirty-five Thousand ($35,000.00) Dollars First National Company Collateral Trust, Series "O" First Mortgage Real Estate 5½% Gold Bonds in denomination of One

Thousand ($1,000.00) Dollars each, and then and there promised that if this plaintiff purchased said bonds and paid therefor, the sum of Thirty-five Thousand ($35,000.00) Dollars, together with the accrued interest thereon, it, the defendant, would repurchase from the plaintiff the said bonds at maturity paying therefor par value of the bonds and accrued interest thereon; and the plaintiff, in consideration thereof did, on, to-wit: November 1, 1929, pay to the said defendant the sum of to-wit: Thirty-five Thousand ($35,000.00) Dollars, and purchased from the defendant the said bonds, and in evidence of the promise and agreement entered into by the plaintiff and the defendant, the said defendant reduced its said agreement into writing, and as an inducement to the plaintiff to purchase said bonds from the said defendant, and as a further consideration thereof, the said defendant, delivered to the plaintiff in writing its promise and agreement to re-purchase the said bonds as aforesaid, which agreement is in words and figures as follows, to-wit:

"Daniel M. Healy, President.
Daniel J. Healy, Vice-Pres.
J. H. Jones, Vice-Pres.
M. F. Schiavone, Vice-Pres.
P. Malakates, Vice-Pres.
E. M. Blankenheim, Cashier
E. J. Nordholm, Asst. Cashier

ATLAS EXCHANGE NATIONAL BANK
OF CHICAGO
Capital and Surplus $240,000.00
CHICAGO, ILL.

Nov. 1, 1929.

Mr. Leo Awotin
1920 S. Halsted St.
Chicago, Illinois.
Dear Sir:

This is to acknowledge that we have this day sold you thirty-five thousand ($35,000.00) Dollars, par value First National Company, collateral Trust, Series "O" First Mortgage Real Estate 5½% gold bonds, in denominations of $1,000.00 each, numbered as follows: #4584-4585 and 4612 to 4644 inclusive.

Should you desire to re-sell these bonds to us, we hereby agree to re-purchase same at maturity at par or $35,000.00 and accrued interest.

Yours very truly,
B. M. BLANKENHEIM,
Cashier.

BMB—R
Member
Federal Reserve System
Chicago Clearing
House Association"

that said bonds above mentioned matured on, to-wit, July 15, 1930, that this plaintiff presented said bonds to the defendant on, to-wit, July 15, 1930, and demanded that it repurchase the same and pay this plain-

tiff the sum of Thirty-five Thousand ($35,000.00) Dollars and the accrued interest due on said bonds; that the defendant refused to repurchase said bonds, and although this plaintiff has made repeated demands subsequent to July 15, 1930, upon the defendant to repurchase the said bonds in accordance with said agreement, yet the defendant, though requested, has not paid the sum of $35,000.00 and accrued interest, or any part thereof to the plaintiff, but refuses so to do; to the damage of the plaintiff of $38,000.00, and therefore he brings his suit, etc.

LEO AWOTIN,
By HUME & KENNEDY,
Attorney for Plaintiff.

(Reverse Side.)

Plaintiff's Affidavit of Amount Due.

State of Illinois, }
County of Cook. } ss.

THOMAS C. KENNEDY, being first duly sworn, says: That the demand of the plaintiff in the above entitled cause is for the sum of thirty-seven thousand eighty-five and 41/100 ($37,085.41) dollars due and owing from the defendant to the plaintiff under its written agreement dated November 1, 1929, and that there is due to the plaintiff from the defendant after allowing to it all just credits, deductions and set-offs thirty-seven thousand and eighty-five and 41/100 ($37,085.41) dollars.

THOMAS C. KENNEDY.

SUBSCRIBED and SWORN to before me this 4th day of September, 1930.

(Seal) KENNETH E. MOBERLY.

11 Appearance and demand for jury by ELBRIDGE W. RICE, attorney for defendant, ATLAS EXCHANGE NATIONAL BANK.

15 Plea filed September 10, 1930:

And the defendant, by E. W. Rice, its attorney, comes and defends the wrong and injury, when, etc., and says that it did not promise in manner and form as the plaintiff has above thereof complained against it; and of this it puts itself upon the country.

ELBRIDGE W. RICE,
Attorney for said Defendant.

"State of Illinois, }
County of Cook. } ss.

"Daniel M. Healy, being first duly sworn, deposes and says that he is president of the above named defendant and its duly authorized agent in this behalf; that there is not owing to plaintiff from defendant the sum of Thirty-seven Thousand Eighty-five dollars and forty-one cents ($37,085.41), or any other sum whatsoever; that said defendant did not enter into any agreement with plaintiff and never authorized or empowered anyone else to enter into the agreement alleged in said declaration or in the affidavit thereto attached.

DANIEL M. HEALY.

Subscribed and sworn to before me this 10th day of September, A. D. 1930.

STEPHEN L. RUFF,
Notary Public."

17 September 28, 1930, notice of placing case on trial calendar filed.

19 Additional plea filed March 24, 1931, as follows:

"And for a further plea in this behalf, the defendant says that the defendant is a national bank, organized under the national banking laws of the United States of America; that neither its charter nor the general law gives to the defendant any power or authority whatever to guarantee payment of the indebtedness or any other person, firm or corporation, nor to repurchase bonds at maturity, and that the supposed guarantee or repurchase agreement of said B. M. Blankenheim, cashier, as set forth in the declaration is *ultra vires* and void. And this the defendant is ready to verify; wherefore it prays judgment, etc.

ELBRIDGE W. RICE,
Attorney for Defendant."

"State of Illinois, }
County of Cook. } ss.

DANIEL M. HEALY, being first duly sworn, deposes and says that he is president of the above named defendant and its duly authorized agent in this behalf; that there is not owing to the plaintiff from defendant the sum of thirty-seven thousand eighty-five and 41/100ths ($37,085.41) dollars, or any other sum whatsoever; that the supposed agreement set forth in said declaration is not the agreement of defendant; that defendant never authorized or empowered anyone to execute the same and that said supposed agreement is *ultra vires* and void.

DANIEL M. HEALY.

Subscribed and sworn to before me this 23rd day of March, A. D. 1931.

STEPHEN L. RUFF,
Notary Public."

24 Replication filed March 31, 1931.

26 Verdict finding issues for defendant in first trial filed March 31, 1931.

28 Instruction of court to find issues for defendant and motion for new trial by plaintiff.

30 May 23, 1931, motion for new trial and for arrest of judgment by plaintiff overruled and judgment for defendant. Appeal prayed and allowed.

32 June 18, 1931, appeal bond of plaintiff approved and filed.

36 July 6, 1931, plaintiff's bill of exceptions filed.

38 Stipulation *re*: bill of exceptions.

40 Mandate of Appellate Court filed March 21, 1932, reversing and remanding the judgment entered May 23, 1931.

42 Substitution of Shulman, Shulman & Abrams as attorneys for plaintiff in place of Hume and Kennedy.

46 Judgment order entered April 15, 1932, recites the matter comes on to be heard on motion of plaintiff's attorneys to strike affidavit of merits for insufficiency upon the remandment and reversal by the Appellate Court in accordance with the opinion rendered by it and for a judgment as of default on the affidavit of claim, finds that the affidavit of merits does not state any defense and orders that affidavit of merits be stricken. Further finds that from plaintiff's affidavit of claim dated September 4, 1930, there was then due plaintiff Thirty-Seven Thousand Eighty-Five Dollars and Forty-One Cents ($37,085.41), and that plaintiff is entitled to interest thereon at 5% from that date amounting to the sum of Two Thousand Seven Hundred Fifty-Six Dollars and Twenty Five Cents ($2,756.25), making a total amount of Thirty-Nine

Thousand Eight Hundred Forty-One Dollars and Sixty-Six Cents ($39,841.66), which the plaintiff is entitled to recover from defendant, for which amount judgment is given and execution ordered. Exception to the entry of the order is taken by defendant and an appeal to the Appellate Court prayed and allowed.

Bill of exceptions filed June 13, 1932, as follows:

Hearing before Judge Thomas S. Taylor pursuant to notice from plaintiff's attorneys to defendant's attorneys that plaintiff will ask that defendant's affidavit of merits be stricken because of failure to state a meritorious defense and that judgment be entered on plaintiff's affidavit of claim, that damages be assessed to include interest from September 4, 1930, at the legal rate in addition to the amount stated in affidavit of claim, making the total amount of the judgment to be entered Thirty-Nine Thousand Eight Hundred Forty-One Dollars and Sixty-Six Cents ($39,841.66). Judge Taylor directed that the motion be presented before Judge Arthur W. Summers, then hearing Judge Taylor's law calendar. April 9, 1932, the parties by their attorneys appeared before Judge Summers and plaintiff's attorneys moved the court to strike defendant's affidavit of merits from the files because of failure to state a meritorious defense and that judgment be entered as in case of default on the affidavit of claim attached to the declaration.

Hearing continued to April 15, 1932, on which date the cause was again heard on the motion to strike defendant's affidavit of merits, which was as follows:

"State of Illinois, }
County of Cook. } ss.

DANIEL M. HEALY, being first duly sworn, deposes and says that he is President of the above named defendant and its duly authorized agent in this behalf; that there is not owing to the plaintiff from the defendant the sum of Thirty-Seven Thousand Eighty-Five and 41/100ths ($37,085.41) Dollars, or any other sum whatsoever; that the supposed agreement set forth in said declaration is not the agreement of defendant; that defendant never authorized or empowered anyone to execute the same and that said supposed agreement is *ultra vires* and void.

DANIEL M. HEALY.

Subscribed and Sworn to before me this 23rd day of March, A. D. 1931.

STEPHEN L. RUFF,
Notary Public."

Whereupon the court ordered that the said affidavit of merits be stricken from the files, to which action of the court in so striking the said affidavit of merits from the files the said defendant then and there duly excepted. And thereupon the said plaintiff, by its said attorneys moved the court to enter a judgment in behalf of the plaintiff and against the defendant as of default on plaintiff's affidavit of claim, which said affidavit of claim is in words and figures as follows:

"Plaintiff's Affidavit of Amount Due.

Circuit Court of Cook County

September Term, A. D. 1930

Leo Awotin

vs.

Atlas Exchange National Bank of Chicago, a corporation.

State of Illinois, } ss.
County of Cook. }

Thomas C. Kennedy, being duly sworn, says that the demand of the plaintiff in the above entitled cause is for the sum of Thirty-Seven Thousand Eighty-Five and 41/100 Dollars ($37,085.41), due and owing from the defendant to the plaintiff under its written agreement dated November 1, 1929, and that there is due
51 the plaintiff from the defendant after allowing to it all just credits, deductions and set-offs Thirty-Seven Thousand Eighty-Five and 41/100 Dollars ($37,085.41).

Thomas C. Kennedy.

Subscribed and sworn to before me this 4th day of September, 1930.

Kennedy E. Moberly,
Notary Public."

Whereupon the court on the said 15th day of April, A. D. 1932, entered a judgment in behalf of the plaintiff and against the defendant in the sum of Thirty-Nine Thousand Eight Hundred Forty-One Dollars and Sixty-Six Cents ($39,841.66), to which action of the court in entering judgment as aforesaid the defendant duly excepted.

Whereupon said defendant prayed an appeal to the Appellate Court of Illinois, for the First District, which

appeal was allowed upon the filing of an appeal bond in the sum of Forty-Five Thousand ($45,000.00) Dollars within thirty (30) days, and a bill of exceptions within sixty (60) days.

Certificate of trial judge, dated June 13, 1932.

52 Stipulation to incorporate into the record the original bill of exceptions.

54 Order approving bill of exceptions.

56 Writ of error from Appellate Court of Illinois to Circuit Court of Cook County filed December 30, 1933.

57 Certificate of clerk.

58 ASSIGNMENT OF ERRORS.

And now comes the Atlas Exchange National Bank of Chicago, the plaintiff in error, by Elbridge W. Rice, its attorney, and says that in the record and proceedings and in rendering the judgment aforesaid on the 15th day of April, A. D. 1932, there is manifest error, in this, to-wit:

1. The Court below erred in striking defendant's affidavit of merits from the files.
2. The Court below erred in entering judgment on plaintiff's affidavit of claim.
3. The Court below erred in rendering a judgment in favor of the plaintiff and against the defendant.
4. The judgment rendered on April 15, 1932, is contrary to the law.

By reason whereof the plaintiff in error prays that said judgment may be reversed.

ELBRIDGE W. RICE,
Attorney for Atlas Exchange National Bank of Chicago, a corporation, Plaintiff in Error.

13 At a Term of the Appellate Court, Begun and held at Chicago, on Tuesday, the Fifth day of June in the year of our Lord One Thousand Nine Hundred and Thirty-four within and for the First District of the State of Illinois.

Present Hon. John J. Sullivan, Presiding Justice.
" " Martin M. Gridley, Justice.
" " Kickham Scanlan, Justice.

Sheldon W. Govier, Clerk. William D. Meyering, Sheriff.

Leo Awotin,
Defendant in error,

No. 37307 vs.

Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in error.

Appeal from Error to Cook Circuit.

Be It Remembered, That heretofore on the 5th day of December, A. D. 1933, it being one of the days of said December Term, A. D. 1933, certain proceedings were had in said Court and entered of record in words and figures following, to-wit:

14 At a Term of the Appellate Court, Begun and held at Chicago, on Tuesday, the Fifth day of December in the year of our Lord One Thousand Nine Hundred and Thirty-three within and for the First Distrtict of the State of Illinois.

Present:
Hon. David F. Matchett, Presiding Justice.
Hon. William H. McSurely, Justice.
Hon. John M. O'Connor, Justice.
Sheldon W. Govier, Clerk.
William D. Meyering, Sheriff.

Court met pursuant to law.
Court opened by proclamation.

And afterwards, on the 28th day of December A. D. 1933, there was filed in the office of the Clerk of said Court the Peoples Praecipe for a Writ of Error and Writ of Scire Facias, which said Praecipe is in the words and figures following, to-wit:

15 PRAECIPE

State of Illinois,
Appellate Court } ss.
First District

To the February Term, A. D. 1934.

Leo Awotin,
(*Plaintiff*), *Defendant in Error*

vs.

Atlas Exchange National Bank of Chicago, a Corporation,
(*Defendant*), *Plaintiff in Error.*

Gen. No. 37307
Error to the Circuit Court of Cook County.
Nisi Prius Gen. No. B-204985
Nisi Prius Judge Arthur W. Summers.

The Clerk will please issue a writ of Error in the above entitled cause, directed to the Clerk of the Circuit Court of Cook County. Also issue a Writ of Scire Facias to the Sheriff of Cook County, commanding him to summon the said Defendant in Error, as provided by law.

This was an action of trespass on the case on promises in the Circuit Court of Cook County, Illinois, wherein judgment was rendered on the 15th day of

April A. D. 1932 and at the March Term of said Circuit Court, on the law side thereof in favor of said plaintiff, Leo Awotin, and against said defendant, Atlas Exchange National Bank of Chicago, a Corporation for Thirty-Nine Thousand Eight Hundred Forty One & 66/100 ($39,841.66) Dollars besides costs of suit.

ELBRIDGE W. RICE,
Attorney for Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in Error.

To Sheldon W. Govier,
Clerk of the Appellate Court,
First District, Illinois.

16 And afterwards on the same day, to-wit: the 28th day of December A. D. 1933, there was issued out of the office of the Clerk of said Court and under the seal of said Court the Peoples Writ of Error in said cause directed to the Clerk of the Circuit Court of Cook County, which said Writ of Error is in the words and figures following, to-wit:

17 State of Illinois
Appellate Court
of the First District } ss.

THE PEOPLE OF THE STATE OF ILLINOIS.

To the Clerk of the Circuit Court for the County of Cook, Greeting:

Because, In the Record and proceedings, as also in the rendition of the Judgment of a plea which was in the Circuit Court of Cook County, before the Judge

thereof, between Leo Awotin, plaintiff, and Atlas Exchange National Bank of Chicago, a Corporation, defendant, it is said manifest Error hath intervened, to the injury of the aforesaid Atlas Exchange National Bank of Chicago, a Corporation, as we are informed by its complaint, and we being willing that Error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Appellate Court the Records and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Chicago, in the County of Cook, on or before twenty days before the first Tuesday of February next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the Error, what of right ought to be done according to law.

Witness, The Hon. David F. Matchett, Presiding Justice of our Court and the seal thereof, at Chicago, this 28th day of December in the year of our Lord one thousand nine hundred and Thirty-three.

SHELDON W. GOVIER,
(Seal) *Clerk of the Appellate Court of the First District.*

18 And afterwards on the same day to-wit: the 28th day of December A. D. 1933, there issued out of the office of the Clerk of said Court and under the seal of said Court the Peoples Writ of *Scire Facias* in said cause directed to the Sheriff of Cook County to execute, which said *Scire Facias* with the return of the

Sheriff thereon endorsed is in the words and figures following, to-wit:

19 State of Illinois }
Appellate Court } ss.
First District }

The People of the State of Illinois, to the Sheriff of Cook County, Greeting:

Because in the record and proceedings, as also in the rendition of the Judgment of a plea which was in the Circuit Court of Cook County before the judge thereof, between Leo Awotin, plaintiff, and Atlas Exchange National Bank of Chicago, a Corporation, defendant, it is said manifest Error hath intervened, to the injury of the said Atlas Exchange National Bank of Chicago, a Corporation, Defendant, as we are informed by its complaint, the record and proceedings of which said judgment we have ordered to be brought into our Appellate Court, of the First District, State of Illinois, at Chicago, before the Justices thereof, to correct the errors in the same in due form and manner, according to law.

Therefore, We Command You, That by good and lawful men of your county, you give notice to the said Leo Awotin that he be and appear before the Justices of our said Appellate Court, at the next term of said Court, to be holden at Chicago, in said State, on the first Tuesday in February A. D. 1934, to hear the record and proceedings aforesaid, and the errors assigned if he shall see fit, and further to do and receive what said Court shall order in this behalf; and have you then and there the names of those by whom you shall give the said notice, together with this writ.

Witness, Hon. David F. Matchett, Presiding Justice of our Court and the seal thereof, at Chicago, this 28th day of December in the year of our Lord one thousand nine hundred and Thirty-three.

SHELDON W. GOVIER,
Clerk of the Appellate Court of the First District, Illinois.

(Seal)

Pd 2.50
M 1.00

State of Illinois } ss.
Cook County }

Served this writ on the within named defendant Leo Awotin by reading the same to him, and at the same time delivering a copy thereof to him this 6th day of January, 1934.

WILLIAM D. MEYERING,
Sheriff,
By EDWARD J. MOREN,
Deputy.

20 And afterwards on the 19th day of January A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

21 In the Matter of the Assignment of Cases to the Second Division, Appellate Court, First District, Illinois. } February Term, A. D. 1934 Calendar

On the Court's own motion it is ordered that the following numbered cases on the February Term Calendar, A. D. 1934 of said Court be and the same are hereby assigned to the Second Division Appellate Court for hearing and determination, to-wit:

37307: *Leo Awotin* v. *Atlas Exchange National Bank of Chicago, a Corp.*

And afterwards, on the 13th day of February, A. D. 1934, it being one of the days of the February Term, A. D. 1934 the Appearance of the Defendant in error was filed in the words and figures following, to-wit:

APPEARANCE

22 State of Illinois, Appellate Court, First District } ss. February Term, A. D. 1934.

Leo Awotin
Gen. No. 37307
vs.
Atlas Exchange National Bank of Chicago, a Corporation.

Appeal from .....
Error to Cook Circuit

I hereby enter the appearance of Leo Awotin and my appearance as attorney for said Leo Awotin in the above entitled cause.

LLOYD C. WHITMAN,
Attorney for Leo Awotin.

22 And afterwards on the 16th day of February A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

23 Leo Awotin,
Defendant in Error
37307 *vs.*
Atlas Exchange National Bank of Chicago,
Plaintiff in Error.

Error to Cook Circuit.

This day came Defendant in error by his counsel and moved the Court to extend the time to and in-

cluding March 19th, A. D. 1934 in which to file his briefs in said cause as per suggestions, affidavit and consent filed herein. And the Court being fully advised in the premises doth order that said time be and the same is hereby so extended.

And afterwards on the 6th day of March A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

24

Leo Awotin, *Defendant in error*	Appeal from
37307 *vs.*	.....
Atlas Exchange National Bank of Chicago, a Corp., *Plaintiff in error.*	Error to Cook Circuit.

This cause having this day been reached in the call of the docket, and counsel not desiring to argue the same, and the Court, not being fully advised in the premises, doth order that said cause be taken under advisement on abstracts and briefs filed by Plaintiff in error and brief of Defendant in error due March 19, 1934.

And afterwards, on the 7th day of March A. D. 1934 the following proceedings were had and entered of record in said cause, to-wit:

25	Leo Awotin, *Defendant in error,* 37307 *vs.* Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error.*	Error to Cook Circuit.
	Rose Kimen, *Defendant in error,* 37308 *vs.* Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error.*	Error to Cook Circuit.

This day came Defendant in error by his Counsel and moved the Court to consolidate cause General Number 37308 for hearing in this Court with cause General Number 37307 in this Court and that the briefs filed and to be filed in cause General Number 37307 stand and be taken and considered as the briefs filed in cause General Number 37308 as per suggestions, affidavit and consent filed herein. And the Court being fully advised in the premises doth order that said motion be and the same is hereby allowed.

And afterwards on the 3rd day of April A. D. 1934, it being one of the days of the April Term A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

26

Leo Awotin,
Defendant in error,

37307 *vs.*

Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in error.

Error to Cook Circuit.

This day came Plaintiff in error by its counsel and moved the Court to advance the above entitled cause for an early decision in this Court as per petition filed herein. And the Court being fully advised in the premises doth order that said motion be and the same is hereby allowed.

And afterwards on the 10th day of April A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

27

Leo Awotin,
Defendant in error,

37307 *vs.*

Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in Error.

Error to Cook Circuit.

Rose Kimen,
Defendant in error,

37308 *vs.*

Atlas Exchange National Bank of Chicago, a Corporation.

Error to Cook Circuit.

This day came Defendants in error by their Counsel and moved the Court that the above entitled cause be

placed on the Oral Argument Calendar of this Court as per suggestions filed herein. And the Court being fully advised in the premises doth grant said motion. It is therefore ordered by the Court that said causes be and the same are hereby placed upon the Oral Argument Calendar of this Court.

And afterwards on the 1st day of May A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

28

37307	Leo Awotin, *Defendant in error,* *vs.* Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error.*	Error to Cook Circuit.
37308	Rose Kimen, *Defendant in Error,* *vs.* Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error.*	Error to Cook Circuit.

On motion of Defendant in error this day made in open Court for leave to file a Supplemental Brief in said cause instanter and that Plaintiff in error be granted leave to file an additional Reply Brief within 10 days. It is ordered by the Court that said motion be and the same is hereby allowed.

And afterwards on the 15th day of May A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

29

	Leo Awotin, *Defendant in error,*	
37307	*vs.*	Error to Cook Circuit.
	Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error*	

	Rose Kimen, *Defendant in Error,*	
37308	*vs.*	Error to Cook Circuit.
	Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error.*	

This day came Defendants in error by their Counsel and moved the Court that the suggestions hereto attached stand and be taken as an additional brief of Defendants in error herein or that the Defendants in error be granted leave to file an additional brief in said cause within 3 days as per suggestions and affidavit filed herein. And the Court being fully advised in the premises doth order that the additional suggestions hereto attached stand and be taken as an additional brief of the Defendants in error herein.

And afterwards on the same day, to-wit: the 15th day of May A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

30	Leo Awotin, *Defendant in error,* 37307 *vs.* Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error*	Error to Cook Circuit.
	Rose Kimen, *Defendant in Error,* 37308 *vs.* Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error.*	Error to Cook Circuit.

This day came Plaintiff in error by its counsel and moved the Court for leave to file the additional suggestions hereto attached as an answer to the suggestions of the Defendant in error as per suggestions filed herein. And the Court being fully advised in the premises doth order that said motion be and the same is hereby allowed.

And afterwards on the 15th day of June A. D. 1934, it being one of the days of the June Term A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

31

Leo Awotin, *Defendant in Error,*		
37307 *vs.*		Error to Cook Circuit.
Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error,*		Appeal from .....

On this day came again the said parties, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned, for error, and being now sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the Judgment aforesaid, there is manifest error: Therefore, it is considered by the Court that for that error, and others in the record and proceedings aforesaid, the Judgment of the Circuit Court of Cook County in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed,

And it is further considered by the Court that the said Plaintiff in error recover of and from the said Defendant in error its costs, by it in this behalf expended in this Court and in the Circuit Court of Cook County to be taxed, and that it have execution therefor.

32 And afterwards on the 26th day of June A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

33

	Leo Awotin, *Defendant in Error,*	
37307	*vs.*	Error to Cook Circuit.
	Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error.*	

	Rose Kimen, *Defendant in Error*	
37308	*vs.*	Error to Cook Circuit.
	Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error*	

The Court having considered the motion of Defendants in error for a Certificate of Importance and an Appeal to the Supreme Court of Illinois in said cause as per petition and affidavit filed herein, and being now fully advised in the premises doth order that said motion be and the same is hereby denied.

And afterwards on the 27th day of June A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

34 *In re* Publication of Written Decisions of This Court

It is hereby ordered that the cases, the numbers and titles of which are given below, the written decisions of this Court filed the 15th day of June A. D. 1934, shall be published in full in the Appellate Court Reports.

And the decisions so filed which are not designated below shall be published by including an adequate abstract of such written decisions.

37307: { Leo Awotin *vs.* Atlas Exchange National Bank of Chicago, a Corp.

And afterwards on the 3rd day of July A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

35

37307	Leo Awotin, *Defendant in Error,* *vs.* Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error.*	Error to Cook Circuit.
37308	Rose Kimen, *Defendant in Error,* *vs.* Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error.*	Error to Cook Circuit.

The Court having considered the motion of Defendants in error that the issuance of the mandate herein be stayed until the time for the filing of a petition in the Supreme Court of Illinois for leave to Appeal shall have expired, or if such petition shall have been filed within the proper time, then until said petition shall have been granted or refused, and the Court being fully advised in the premises, doth grant said motion, and doth order that the issuance of the mandate in said cause be and the same is hereby stayed accordingly.

And afterwards on the same day to-wit: the 3rd day July A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

36

Leo Awotin,
Defendant in Error,

37307 *vs.*

Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in Error.

} Error to Cook Circuit.

Rose Kimen,

37308 *vs.*

Defendant in Error,
Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in Error

} Error to Cook Circuit.

The Court having considered the motion of Defendants in error that the issuance of the mandate herein be stayed until the time for the filing of a petition in the Supreme Court of Illinois for a Writ of Certiorari to review the judgment of this Court in said cause shall have expired, without any such petition having been filed, and if such petition for said Writ shall have been filed within the proper time, then until said writ of certiorari shall have been granted or refused, and the Court being fully advised in the premises, doth grant said motion and doth order that the issuance of the mandate in said cause be and the same is hereby stayed accordingly.

And afterwards on the 16th day of August, A. D. 1934, it being one of the days in vacation after the June Term A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

37

Leo Awotin,
Defendant in Error,

37307 *vs.*

Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in Error,

Error to Cook Superior.

On this day in vacation after the June Term A. D. 1934 came Defendant in error by his Counsel and moved the Honorable John J. Sullivan, one of the Justices of said Court, to substitute Samuel A. and Leonard B. Ettelson as Attorneys for Defendant in error herein in said cause, in lieu of Lloyd C. Whitman as per withdrawal and substitution filed herein. And the undersigned being fully advised in the premises doth order that said motion be and the same is hereby allowed.

JOHN J. SULLIVAN,
Justice of the Second Division, Appellate Court, First District, Illinois.

And afterwards on the same day to-wit: the 16th day of August A. D. 1934, it being one of the days in vacation after the June Term A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

38

Leo Awotin,
Defendant in Error

37307 *vs.*

Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in Error

Error to Cook Circuit.

On this day in vacation after the June Term A. D. 1934 came Leo Awotin, Defendant in error in said cause and Plaintiff in the Circuit Court of Cook County, and moved the Honorable John J. Sullivan, one of the Justices of said Court, for the issuance of the Certificate of this Court that there is fairly involved in the claim of the said Leo Awotin, Defendant in error aforesaid more than Fifteen Hundred Dollars ($1500.00) as per affidavit filed herein. And the undersigned being fully advised in the premises is of the opinion and Therefore Certify that more than Fifteen Hundred Dollars ($1500.00) is fairly involved in the claim of the said Leo Awotin, Defendant in error herein and Plaintiff in the Circuit Court of Cook County.

JOHN J. SULLIVAN,
Justice of the Second Division, Appellate Court, First District, Illinois.

And heretofore, on the 15th day of June, A. D. 1934, it being one of the days of the June Term A. D. 1934, there was filed in the office of the Clerk of said Appellate Court the written opinion of this Court, which opinion is in the words and figures following, to-wit:

39

37307	Leo Awotin, *Defendant in Error,* *vs.* Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error.*	Error to Circuit Court, Cook County.

Mr Justice Gridley Delivered the Opinion of the Court.

On December 28, 1933, the defendant, Atlas Exchange National Bank of Chicago, sued out the present writ of error to reverse a judgment order of the circuit court, entered April 15, 1932, in substance as follows:

> This cause coming on to be heard upon plaintiff's motion to strike defendant's affidavit of merits for *insufficiency* "upon the remand of the cause upon the reversal thereof by the appellate court for the first district in accordance with the opinion rendered by it," and "for a judgment as of default on the affidavit of claim," and it appearing that "the affidavit of merits does not state any defense to plaintiff's cause of action" and that the court is therefore entitled to strike said affidavit of merits, it is "Therefore Ordered that said affidavit of merits • • • is hereby stricken from the files in this cause."
>
> And it further appearing from plaintiff's affidavit of claim, dated September 4, 1930, that there was due to plaintiff at said date the sum of $37,085.41, and that plaintiff is entitled to interest at 5 per cent on said sum from the date of the affi-

davit of claim to this day, which has been computed to be the sum of $2,756.25; and that the total damages sustained by plaintiff, and herein assessed against defendant, amount to the sum of $39,841.66; and that plaintiff is entitled to recover said total sum from defendant.

"WHEREUPON it is considered by the court that plaintiff have and recover of defendant his damages in the sum of $39,841.66;" and that the clerk of this court issue an execution in favor of plaintiff and against defendant "on the judgment herein now entered as aforesaid."

This is the second time the cause has been before us. From our former opinion (*Awotin* v. *Atlas Exchange National Bank,* 265 Ill. App. 238), it appears that plaintiff's action against defendant (commenced August 19, 1930) is in *assumpsit;* that during March, 1931, on the issues made by the pleadings, the cause came on for trial before a jury; that at the conclusion of plaintiff's evidence the court, on defendant's motion, directed the jury to return a verdict in *defendant's* favor, which they did; that on May 23, 1931, judgment was entered upon the verdict against plaintiff for costs and he appealed to this court; and that on February 23, 1932, for reasons stated in the opinion, we reversed the judgment and remanded the cause, generally and without specific directions. In the opinion we outlined the pleadings, including the accompanying affidavits, as follows (pp. 239-41):

"Plaintiff's declaration consisted of a special count and the common counts. In the special count he alleged that on November 1, 1929, at Chicago, defendant offered to sell to him '$35,000 Dollars First National Company Collateral Trust, Series O, First Mortgage Real Estate 5½% Gold Bonds in denominations of $1,000 each, and then and there promised that, if plaintiff purchased the

bonds and paid therefor the sum of $35,000, together with accrued interest thereon, it (defendant) would repurchase the bonds at maturity, paying therefor the par value of the bonds and accrued interest;' that plaintiff, in consideration thereof, on November 1, 1929, paid to defendant said sum and purchased the bonds from it; that to evidence the agreement defendant reduced the same to writing and, as an inducement to plaintiff to purchase the bonds, then and there delivered to plaintiff the following writing:

Nov. 1, 1929.

'Mr. Leo Awotin,
1920 S. Halsted Street, Chicago.

Dear Sir:

This is to acknowledge that we have this day sold you $35,000 par value First National Company, Collateral Trust, Series O, First Mortgage Real Estate 5½% gold bonds, in denomination of $1,000 each, numbered as follows: #4584-4585 and 4612 to 4644, inclusive.

[Should you desire to resell these bonds to us, we hereby agree to repurchase same at maturity at par, or $35,000 and accrued interest.]

Yours very truly,

B. M. BLANKENHEIM,

Cashier.'

That the bonds matured on July 15, 1930; that on that day plaintiff presented them to defendant and demanded that it repurchase them and pay to plaintiff the sum of $35,000 and accrued interest; that defendant refused so to do; and that although plaintiff has made repeated demands on defendant since July 15, 1930, to the same effect it has not repurchased the bonds or paid to him the $35,000 and accrued interest or any part thereof, but still refuses. To plaintiff's damage, etc.

41 In plaintiff's affidavit of amount due, attached to the declaration, and dated September 4, 1930, it is stated that his demand 'is for the sum of $37,085.41, due and owing to plaintiff from defendant *under its written agreement, dated November 1, 1929,* and that there is due from defendant after allowing to it all just credits, deductions and set-offs $37,085.41.'

Defendant entered its appearance by attorney, demanded a jury trial, and filed a plea of the general issue. In the accompanying affidavit of merits of Daniel M. Healy he alleged that he is the president of defendant, that there is not owing to plaintiff any sum of money, and that 'defendant did not enter into any agreement with plaintiff and never authorized or empowered anyone else to enter into the agreement alleged in the declaration or in the affidavit thereto attached.' On the eve of the trial defendant by leave of court, filed an additional plea alleging that it is a national bank, organized under the banking laws of the United States, that 'neither its charter nor the general law gives to defendant any power or authority whatever to guarantee payment of the indebtedness of any other person, firm or corporation nor to repurchase bonds at maturity,' and that the supposed guarantee or repurchase agreement of said Blankenheim, cashier, as set forth in the declaration, 'is *ultra vires* and void.' To this additional plea plaintiff filed a replication."

It also appears from the present record that there accompanied said additional plea an affidavit of merits, signed and sworn to by said Healy, stating:

"That there is not owing to plaintiff from defendant the sum of $37,085.41, or any other sum whatsoever; that the supposed agreement set forth in said declaration is not the agreement of defendant; that defendant never authorized or empowered anyone to execute the same; and that said supposed agreement is *ultra vires* and *void.*"

And the bill of exceptions discloses that on April 9, 1932, after the mandate of this court had been filed, an attorney for plaintiff appeared in the circuit court, after notice to defendant, and moved the court "to strike defendant's affidavit of merits from the files because of its *failure to state a meritorious defense*, and that judgment be entered against defendant, as in case of default, on the affidavit of claim attached to plaintiff's declaration;" and that on April 15, 1932, after arguments of respective counsel, the court granted the motion and entered the judgment now in question against defendant as first above mentioned.

In our former opinion, we quoted a portion of subsection 7 (as amended February 25, 1927) of Section
42 5136 of the U. S. Revised Statutes, relating to the powers, etc. of National Banks, as follows:

> "To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits, by buying and selling exchange, coin and bullion, by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title: *Provided*, That the business of buying and selling *investment securities* shall hereafter *be limited* to buying and selling *without recourse* marketable obligations evidencing indebtedness of any person, co-partnership, association, or corporation, in the form of *bonds*, notes and/or debentures, commonly known as investment securities, under such further definition of the term 'investment securities' as may by regulation be prescribed by the Comptroller of the Currency, * * *."

We then stated the contentions of respective counsel as follows (p. 243):

> "Counsel for the bank contended in the trial court and contends here that under the above statute no recovery can be had by plaintiff in the present action, because the agreement of November 1, 1929, sued upon, is *ultra vires* the bank and wholly void. Counsel for plaintiff contend in substance that the court erred in entering the judgment (following the directed verdict) because:
>
> (1) The sale of the bonds by the bank to plaintiff, coupled with its written agreement to repurchase them at maturity at par and accrued interest amounts to a *conditional sale,* which is valid as such and the statute has no application; and
>
> (2) Even if it be considered that the bank in making the repurchase agreement acted *ultra vires,* plaintiff, having tendered the bonds, is entitled to recover back what he paid therefor plus accrued interest on an *implied* assumpsit,—the bank having retained the moneys it received in the transaction."

And we expressed the opinion (p. 244), after considering the written agreement of November 1, 1929, the arguments of respective counsel and numerous adjudicated cases, that the trial court had erred in instructing the jury as it did and in entering the judgment against plaintiff. We then discussed said two contentions of plaintiff's counsel and expressed the opinion that there was substantial merit in each. As to the first contention we cited and quoted from the cases of *Wolf* v. *National Bank of Illinois,* 178 Ill. 85, 93-5, and *Freedman* v. *Madison & Kedzie State Bank,* 259 Ill. App. 519, 523-4. As to the second contention we cited and quoted from several cases decided by the
43 Supreme Court of the United States. And we also discussed, and decided adversely to it, defendant's fur-

ther contention that there could be no recovery by plaintiff in the case upon an *implied* promise or agreement.

After considering the pleadings and plaintiff's evidence and the stipulation introduced upon the *first* trial (as outlined on pages 241-2 of our former opinion), we think that it may reasonably be inferred that the trial court, in directing the jury to return a verdict in defendant's favor and in entering the judgment, was of the opinion that no recovery could be had by plaintiff on the repurchase agreement sued upon because such agreement was *ultra vires* the Bank and void upon grounds of public policy. And we also think that it may reasonably be inferred that the court, in taking the action it did on the *second* hearing, after remandment of the cause, and in entering the judgment of April 15, 1932, now in question, was moved to do so because of the decision and holdings in our former opinion.

On December 22, 1933 (six days before the present writ of error was sued out to reverse the judgment now in question) our Supreme Court decided the case of *Knass* v. *Madison and Kedzie State Bank*, 354 Ill. 554. In that case the first division of this appellate court, on March 6, 1933, had affirmed a decree, with certain modifications, of the superior court of Cook county (269 Ill. App. 588, 611), and the case reached the Supreme Court on appeal and certificate of importance granted. The Supreme Court reversed the judgment of the appellate court and the decree of the superior court, and remanded the cause to the superior court "with directions to dismiss complainant's bill for want of equity" (p. 572). In that case certain bonds were sold to complainants under certain "re-

purchase agreements" by the bank, which are similar to the repurchase agreement in the present case, in that it is stated in one repurchase agreement: "These
44 bonds may be cashed at any time after one year at 99 and accrued interest or in three and one-half years at par;" and in the other: "Will purchase these bonds at any time after one year at 99, and after three and one-half years at par if desired." The bank was one organized under the laws of this State, as distinguished from one organized under the laws of the United States, as is the defendant in the present case. In the opinion of the Supreme Court in the *Knass* case, after outlining the pleadings and stating certain facts, etc., it is said (p. 561): "Of first importance on this record is the question whether the repurchase agreements, assuming them to have been such and to have been made by the bank, are *ultra vires* the powers of the bank and contrary to the declared public policy of the State, and so unenforceable. This question has never been passed upon by this court."

Then follows in the opinion an exhaustive discussion of the question, accompanied with the citation of numerous adjudicated cases in this State and in other jurisdictions bearing upon it. In conclusion the Court determined the question in the affirmative. And the Court said (p. 567): "As often stated by this court, one dealing with a banking or other corporation having limited and delegated powers is chargeable with notice of those powers and their limitation." (Citing cases.) And in discussing the question whether the repurchase agreements were to be considered as being void as against public policy, the Court said in part (pp. 567-8, italics ours):

> "Are such contracts as here relied upon void as against public policy or violative of statutory

enactment? Contracts against public policy are generally unenforceable by any remedy. (Restatement of the Law of Contracts, Am. Law Ins., Sec. 369.) Public policy is a principle of law which holds that no one may lawfully do that which has a tendency to injure the public or to be against the public good. Banks are quasi-public institutions. Their well-being concerns not only the stockholders but the depositors and public at large. Contracts are against public policy when they tend to injure the public. *Agreements such as are here involved fall within that category.* Recent experience, so general as to afford the basis of judicial notice, has shown that contracts not within the powers conferred on banks and which so jeopardize the safety of bank deposits as to result in their loss, tend to produce widespread injury to the public, and may properly be held void *though there be found no specific statutory prohibition against them.* It is an academic rule of law that from the constitution and statutory enactments may be gleaned the public policy of the State. The General Assembly of this State in 1879 passed an act entitled 'An Act for the protection of bank depositors,' approved June 4, 1879, (Smith's Stat., 1931, Chap. 38, par. 64.) Section 4 of this act is as follows:

'It shall not be lawful for any savings bank, individual or individuals doing banking business, banking company, or incorporated bank receiving savings deposit, or deposits of trust funds, to assume the payment of, or to become liable for, or to guarantee to pay the principal of, or interest on, any bonds, notes or other evidence of indebtedness of, for, or on account of any person or persons, company or incorporation; and in any assumption, liability or guarantee, whereby such deposits of trust funds could be jeopardized or impaired shall be null and void.'

This section has not heretofore been construed by this court. It seems clear, however, that pay-

ment or assumption of or guaranteeing to pay bonds of the character here involved is of the gist of the prohibition of this act applicable in any case where by any such contracted liability the deposits or the trust funds of the bank could become jeopardized or impaired. The act for the protection of bank depositors evidences an intention on the part of the legislature to declare contracts of the character before us *void as against the public policy of the State.* That act, section 4 of which is herein quoted, was enacted, as the title indicates, for the protection of bank depositors. Its enactment was for the public generally and should be construed to carry out that purpose. (*People* v. *Tallmadge,* 328 Ill. 210.)"

And the Court, after disagreeing with an argument made that the quoted statute was not applicable to the particular facts, further said in part (pp. 568-9):

"The bonds are evidences of indebtedness of the corporations which owned the real estate and executed the bonds, and by these agreements the bank's undertaking is to guarantee the bonds of those corporations. The fact that the bank may have received a commission for selling them in nowise renders the mortgage bonds obligations of the bank. It follows that agreements to repurchase them at their face value, or with a deduction of one per cent for handling, as complainants construe these agreements, are agreements to assume or guarantee the payment of the evidences of indebtedness of another corporation, contrary to the express provisions of the act for protection of bank depositors. As it cannot be doubted that such an agreement could jeopardize or impair the deposits or trust funds of the bank, such contract, because of its inherent danger to deposits and trust funds and because it is contrary to the public policy of the State, as evidenced by the legislative expression in section 4 of the statute quoted, is null and void."

46 And the Court, after stating a contention of the complainants (viz., that the old bank, having received the purchase price of the bonds in question, "is *estopped* from setting up the defense of *ultra vires*") decided against the contention, saying in part (pp. 569-70, italics ours):

> "Under the established law of this State the defense of *ultra vires* is available to the old bank *when sued on a void agreement.* It is said, however, that the complainants performed and executed their part of the agreement, and that it would not be good faith to permit the bank now to refuse. The same question was raised in *Steele* v. *Fraternal Tribune, supra* (215 Ill. 190), where this court said (pp. 193-4):
>
> 'A contract of a corporation which is *ultra vires* in the proper sense of that term—that is to say, outside the object of its creation, as defined by the laws of its organization, and therefore beyond the powers conferred upon it by the legislature,—is not only voidable, but *wholly void and of no legal effect.* The objection to the contract here is, not merely that the corporation *ought not* to have made it but that it *could not lawfully make it.* The contract could not be ratified by either party because it could not have been authorized by either. No performance by the parties could give the unlawful contract validity or become the foundation of any right of action upon it. • • • But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by those laws. The powers delegated by the State to corporations are matters of public law, of which no one can plead ignorance. A party dealing with a corporation having limited and delegated powers is chargeable with notice of those powers and their limitations and cannot

plead his ignorance of their existence.' (Citing cases.)

"*A contract void because it is prohibited by law can in no manner be enforced.* The law does not prohibit and also enforce a contract. (Citing cases.) Complainants are chargeable with notice that the old bank was utterly without power to make these repurchase agreements. The defense of *ultra vires* is properly urged here."

And the Court discussed, and decided adversely to them, complainants' contention that the agreements involved should not be considered as "repurchase agreements" but as "conditional sales contracts." In support of the contention complainants had cited two cases,—one of which was *Wolf* v. *National Bank of Illinois*, 178 Ill. 85 (which this appellate court had referred to and relied upon in its said former opinion in the present case.) But our Supreme Court, in its opinion in the *Knass* case, said in part (pp. 570-2, italics ours):

47 "In the *Wolf* case the contention was that contracts similar in terms to those before us were options and gambling contracts. The court held, however, that the record showed that it was the intention of the parties that the purchaser was to be allowed a certain time in which to elect whether he was to keep or return them, and so the transaction was a conditional sale. *Such are not the facts here*, but it is evident that complainants and the bank considered that the sale was completed and by a separate agreement the bank agreed to repurchase the bonds. *Such does not constitute a conditional sale.* * * * The statute for the protection of bank depositors was not called to the attention of the court. *Stewart* v. *Dodson*, 282 Ill. 192 (the other case cited by complainants in the *Knass* case), involved a contract for repurchase

between individuals and no question of limitation of powers arose. * * * *These cases are not controlling here.* It seems clear here that both the evidence of the transaction itself and the theory on which the bill is brought *preclude a construction of these agreements as conditional sales contracts.* Complainants' evidence shows that they *bought the bonds outright* and that in the sale of these bonds to them the title passed. * * * Complainants also received interest on the bonds sold them, which they did not offer to return when tender was made of the bonds. The purchase price was paid in full, and what the purchasers did with the bonds lay entirely with them. They were under no obligations to return them and no condition remained to be discharged in order to pass title. They could hypothecate them, sell them elsewhere, and were in nowise required to account to the bank. *These were not conditional sales.*"

On February 5, 1934 (before oral argument of the present cause was had in this court) the Supreme Court of the United States decided the case of *Texas & Pacific Railway Co.* v. *Pottorff*. The opinion is published in the Supreme Court Reporter, Vol. 54, No. 7, at pages 416-20, and it there appears in substance that the Railway Co. filed a bill against Pottorff as receiver of a *national* bank at El Paso, Texas; that Pottorff filed a cross-bill; that after evidence heard the U. S. District Court entered a decree on his cross-bill and dismissed the bill of the Railway Co.; that the decree was affirmed by the U. S. Circuit Court of Appeals (63 Fed. 2nd, 1): and that on certiorari the Supreme Court also affirmed the decree. It is stated in the opinion that "the main question for decision is whether a *national* bank has *power* to pledge a part of its assets to secure a private deposit;" that the bank failed in September, 1931, at which time the Railway

Co. was and long prior thereto had been a depositor; that to secure it as such the bank, in January, 1931, had pledged $50,000 Liberty Bonds and held them for the Railway Co. in the bank's trust department; that
48 when the bank failed the Railway Co.'s balance in its regular checking account was $54,646, of which sum it made proof of claim as a secured creditor; that the receiver approved the amount of the claim but *denied the validity of the pledge*, and he tendered a dividend check only for the amount to which the Railway Co. would have been entitled as an unsecured creditor; that thereupon the Railway Co. filed its bill against the receiver "praying, in the alternative, that the bonds be delivered to it, or that they be sold for its benefit, or that the claim be paid in full with interest;" that the receiver in his cross-bill prayed that the bank's title to the bonds be quieted; and that the District Court in its decree held that "the pledge *was void* and that the Liberty Bonds constituted assets to be administered for the benefit of the general creditors of the bank," which decree was affirmed by the Circuit Court of Appeals. It is further stated in the opinion that the Railway Co. contended (1) "that the bank had power to make the pledge; (2) that even if the bank did not have such power, the receiver is not in a position to question the validity of the pledge; and (3) that even if he is not estopped from doing so, he may not disaffirm it *without returning the consideration therefor received by the bank.*" And the Supreme Court expressed the opinion that "none of these contentions is sound." And after setting forth certain additional facts as found by the District Court, the Supreme Court made numerous holdings, which are epitomized in the syllabi of the case as reported, in substance as follows: (1) That national banks *lack*

power to pledge their assets to secure private deposits; (2) that the measure of powers of such banks is statutory grant, and powers *not conferred* by Congress *are denied;* (3) that the Court takes judicial notice of facts indicating that among national banks the practice of pledging assets must have been deemed *contrary to good banking practice;* (4) that a receiver
49 for an insolvent national bank is *not estopped* to deny the validity of a pledge of assets to secure a private deposit; (5) that no rights arise on an *ultra vires* contract, even though the contract has been fully performed; (6) that it is the duty of the receiver of an insolvent corporation to take steps to set aside transactions which fraudulently or illegally reduce the assets available for the general creditors, even though the corporation itself was not in a position to do so; and (7) that the receiver of an insolvent national bank may assert the invalidity of a pledge of assets to secure a private deposit without making restitution by paying the pledgee's claim in full. And the Court, as to the above propositions, Nos. 4 and 5, said (p. 420, italics ours):

> "The receiver is not estopped to deny the validity of the pledge. The railway's argument is that the bank could not set up the defense of *ultra vires* since it had the benefit of the transaction; and that the receiver, as its representative, can have no greater right. *Neither branch of the argument is well founded. The bank itself could have set aside this transaction.* It is the settled doctrine of this court that *no rights arise* on an *ultra vires* contract, *even though the contract has been performed;* and that this conclusion *cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised.*" (Citing cases.)

Counsel for the Atlas Bank, as grounds for a reversal of the present judgment, contends that the decisions and holdings in the *Knass* and *Pottorff* cases, *supra*, are decisive and controlling as to the issues here involved; that no recovery can be had by plaintiff (Awotin) by virtue of the written agreement of November 1, 1929, sued upon, and as set forth in the special count of plaintiff's declaration hereinabove mentioned; and that it should be held that the making of such an agreement was *ultra vires* the bank and against public policy and that, hence, the agreement is void and unenforceable. And counsel argues in substance that, notwithstanding the fact that in the *Knass* case the defendant was an Illinois banking corporation while in the present case defendant is a *national* bank, the respective statutes (above set forth) as to their powers, and as to the limitations on their powers, are similar, and that the decision and holdings in the *Knass* case can here properly be applied. It will be noticed that in sub-section 7 (as amended in 1927) of the National Bank Act, the proviso reads in part: "Provided, that the business of buying and *selling* investment securities shall hereafter be *limited* to buying and selling *without recourse* marketable obligations • • • in the from of bonds, notes and/or debentures, commonly known as 'investment securities,' • • •." The terms "without recourse" or "no recourse" have well settled meanings. In Anderson's Dictionary of Law, 1893, p. 865, it is said that by the use of the former stated words "the holder of negotiable paper may transfer title without incurring the responsibility of an indorser." In Webster's New International Dictionary, 1933, p. 1785, it is said that the words, "when added to the indorsement of a negotiable instrument, protect the indorser from liability to the

indorsee and subsequent holders." And in *Lyons* v. *Fitzpatrick*, 52 La. Ann. 697, 699, it is said: "Words are to be understood in their ordinary significance. 'No recourse' means no access to, no return, no coming back upon, no assumption of any liability whatsoever, no looking to the party using the term for any reimbursement in case of loss, or damage, or failure of consideration in that which was the cause, the motive, the object, of the undertaking or contract."

After again considering the pleadings in the present case and the written agreement of November 1, 1929, sued upon, and in view of the decisions and holdings in said *Knass* and *Pottorff* cases, we are of the opinion that the present judgment of April 15, 1932, cannot stand because it is contrary to the law. And we are now of the belief that, when on February 23, 1932, on the former appeal, we entered our former
51 judgment (reversing the former judgment of the circuit court in favor of defendant and remanding the cause generally), we acted erroneously.

One of the contentions here made by counsel for plaintiff is that our holdings and decision on said former appeal are "binding" upon us in the present writ of error cause. In other words the contention is in substance that, under the rule or doctrine of the "Law of the Case," we should affirm the present judgment. We cannot agree with the contention. In 2 R. C. L., p. 226, sec. 188, in discussing the limitations of the general rule, the writer says: "The better rule, and that more in accord with justice, however, is that though ordinarily a question considered and determined on the first appeal is deemed to be settled and not open to re-examination on a second appeal, it is not an inflexible rule, and if the prior decision is palpably erroneous it is competent for the court to cor-

rect it on the second appeal. This may be said to be the view which has for its support the trend of modern authority, * * *." In *Zerulla* v. *Supreme Lodge*, 223 Ill. 518, it was decided that a proposition of law laid down by an appellate court of Illinois, upon reversing a judgment *generally* and remanding the cause, is not binding upon that court upon a second appeal, where the Supreme Court has since the first appeal decided the point involved contrary to the proposition laid down. And the Court said (pp. 519-20, italics ours):

> "Plaintiff in error contends that the law of the case was settled and announced by the appellate court the first time the case was before that tribunal and before the decision of this court in the *Seitzinger* case (204 Ill. 58) was filed, and that the law as announced by the appellate court at that time must govern the future progress and determination of this case. * * * The judgment and order of the appellate court" (on the first appeal to it, 99 Ill. App. 630, 637), "reversing and remanding the case was general in its terms and contained no directions to the trial court. It was neither final nor conclusive between the parties, no appeal could have been prosecuted from it, and it was, therefore, not *res adjudicata*. (Citing cases.) Where the appellate court or this court, on the first appeal to it, announces a particular view of the law governing the case and reverses and remands the case for further proceedings in accordance with the views announced, if the case
52 is again brought before such court for review the former decision is binding on the court making it, and the questions decided and determined by it on the first appeal are not open for reconsideration on the second appeal. But while the determination of a question of law by the appellate court on the first appeal may, as a general rule, be binding upon it on the second appeal, it certainly cannot be binding on this court. *Nor would the appel-*

late court on the second appeal, we apprehend, *be obliged to adhere* to a proposition of law laid down on the first appeal, when this court had, *since the first appeal,* decided the *precise question* contrary to the rule announced by the appellate court. *To so hold would lead to most illogical results.*"

Reference may also be made to other adjudicated cases bearing upon the question: *Messenger* v. *Anderson,* 225 U. S. 436, 444; *Johnson* v. *Cadillac Motor Car Co.,* 261 Fed. Rep. (C. C. A.) 878, 886; *City of Hastings* v. *Foxworthy,* 45 Neb. 676, 699; *Missouri, etc. Ry. Co.* v. *Merrill,* 65 Kan. 436, 451. In the *Messenger* case it is said (p. 444, italics ours): "In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, *not a limit to their power.*" In the *Johnson* case (p. 886) it is said, "We recognize the full force and effect of the doctrine of *stare decisis* and the general rule that on a second appeal matters disposed of on the first appeal ordinarily will not again be considered. * * But the rule is not an inexorable one, and should not be adhered to in a case in which the court has committed an error which results in injustice, and at the same time lays down a principle of law for future guidance which is unsound and contrary to the interests of society."

Another contention of plaintiff's counsel is in substance that the circuit court on the second hearing properly struck for insufficiency defendant's affidavit of merits (which accompanied its additional plea to plaintiff's declaration), and properly entered the judgment of April 15, 1932, now in question, for the rea-

son that the affidavit stated "mere conclusions and not the essential facts." In our opinion the contention
53 is lacking in merit. The affidavit is set forth in a foregoing paragraph of this opinion. It alleges *inter alia* that "there is not owing to plaintiff from defendant the sum of $37,085.41, or any other sum whatsoever," and that the agreement, set forth in plaintiff's declaration is "*ultra vires* and *void*." No question was raised as to the sufficiency of the affidavit at or prior to the time of the first trial. And on the second hearing, as appears from the present judgment order, first herein mentioned, plaintiff's motion to strike said affidavit for insufficiency was apparently based "upon the remandment of the cause upon the reversal thereof by the appellate court for the first district in accordance with the opinion rendered by it." Furthermore, we think that the affidavit was sufficient to give notice to plaintiff that one of the defenses to plaintiff's action was that the repurchase agreement sued upon was *ultra vires* the bank to make, and *void* in law and, hence, unenforceable. There was sufficient notice of the nature of the defense. (See, *Firestone Tire Co.* v. *Ginsbury*, 285 Ill. 132, 136; *Thayer* v. *Belender*, 250 Ill. App. 16, 22; *Runyan* v. *Moon*, 267 Ill. App. 312, 314.)

Plaintiff's counsel also contends that "even if it be considered that the bank in making the repurchase agreement acted *ultra vires*, plaintiff, having tendered the bonds, is entitled to recover back what he paid therefor, plus accrued interest, on an implied *assumpsit*." It is our opinion that this contention is also without merit. Plaintiff's affidavit of claim accompanying his declaration does not disclose that he is seeking a recovery on the theory of an implied *as-*

assumpsit after having tendered back the bonds, but rather by virtue of said repurchase agreement of November 1, 1929. Furthermore, as stated in the opinion in the *Potorff* case, *supra*, it is the settled doctrine of the Supreme Court of the United States that "no rights arise on an *ultra vires* contract even though the
54 contract has been performed." This is also the settled law of this State as appears from the opinion in the *Knass* case, *supra*, (pp. 569-70). And we think that under said decisions and holdings plaintiff's counsel's further contention, that defendant cannot avoid the contract on the ground that it is *ultra vires* "without tendering to plaintiff the money defendant received from plaintiff" is equally without merit.

After this cause had been orally argued by respective counsel, we allowed plaintiff's counsel to file certain typewritten suggestions on points mentioned and arising on said oral argument and thereafter certain counter suggestions were filed by defendant's counsel. We have reviewed these suggestions but are of the opinion that a discussion of them is here unnecessary in view of the record before us and the decisions and holdings in said *Potorff* and *Knass* cases, *supra*.

Our conclusions are that the circuit court erred in entering against defendant the judgment of April 15, 1932, in question; that said judgment should be reversed; and that as the law will not allow any recovery to be had by plaintiff against defendant on the repurchase agreement of November 1, 1929, sued upon and as set forth in plaintiff's declaration, the case will not be remanded. Accordingly, the judgment is reversed.

REVERSED.

SULLIVAN, P. J., and SCANLAN, J., CONCUR.

55 And afterwards on the 31st day of October A. D. 1934, it being one of the days of the October Term A. D. 1934, there was filed in the office of the Clerk of said Appellate Court, a certified copy of an order of the Supreme Court of Illinois, denying the petition for Leave to Appeal in said cause, which same order is in the words and figures following, to-wit:

56 United States of America }
State of Illinois } ss.

At a Supreme Court, Begun and held in Springfield, on Tuesday the Second day of October, in the year of our Lord One Thousand Nine Hundred and Thirty-four, within and for the State of Illinois.

Present: the Honorable Norman L. Jones, Chief Justice Honorable Clyde E. Stone, Justice Honorable Frederic R. DeYoung, Justice Honorable Warren H. Orr, Justice Honorable Lott R. Herrick, Justice Honorable Paul Farthing, Justice Honorable Elwyn R. Shaw, Justice Otto Kerner, Attorney General Warren C. Murray, Marshal. Attest: Adam F. Bloch, Clerk.

Be It Remembered, that to-wit: on the 23rd day of October A. D. 1934, the same being one of the days of the said October term of said Supreme Court, certain proceedings were had in said Court and entered of record in the words and figures following to-wit:

PETITION FOR LEAVE TO APPEAL FROM FIRST DISTRICT.

OCTOBER 23, A. D. 1934.

LEO AWOTIN,
Petitioner.

No. 22749 *vs.*

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO,
Respondent.

B. 204983-37307.

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record, abstract, brief and argument filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, Adam F. Bloch, Clerk of the Supreme Court of the State of Illinois and Keeper of records, files and seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Testimony Whereof, I have set my hand and affixed the seal of the said Supreme Court in Springfield, in said State, this 30th day of October in the year of

Our Lord one Thousand nine hundred and Thirty-four.

Adam F. Bloch,

(Seal) *Clerk of the Supreme Court.*

I, Sheldon W. Govier, Clerk of the Appellate Court, in and for the First District of the State of Illinois and Keeper of the records, files and seal thereof, Do Hereby Certify, that the foregoing pages numbered 1 to 11 inclusive are a true copy of the Abstract of Record filed by the Plaintiff in error in the case of *Leo Awotin, Defendant in Error* v. *Atlas Exchange National Bank of Chicago, a Corporation, Plaintiff in Error,* in said Appellate Court on January 17th, A. D. 1934.

I further certify that the foregoing pages 12 to 56 inclusive are a true, full and complete Transcript of the Record of proceedings of said Appellate Court in the case of *Leo Awotin, Defendant in Error* v. *Atlas Exchange National Bank of Chicago, a Corporation, Plaintiff in Error,* of record in my office, and also of the opinion of said Appellate Court rendered herein and filed in said cause on the 15th day of June A. D. 1934, and also a certified copy of the order of the Supreme Court of Illinois denying the Petition for Leave to Appeal in said cause which was filed in said Appellate on the 31st day of October A. D. 1934, in said cause, as all of the same now appear on file in my office.

In Testimony Whereof, I have set my hand and affixed the seal of said Appellate Court, this 15th day of December, in the year of our Lord One Thousand Nine Hundred and Thirty-four.

Sheldon W. Govier,

Clerk of the Appellate Court,

(Seal) *First District, Illinois.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 4, 1935

The petition herein for a writ of certiorari to the Appellate Court of the State of Illinois, First District, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.